

NOTES

PRICE TAGS ON CITIZENSHIP: THE CONSTITUTIONALITY OF THE FORM N-600 FEE

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Proof of citizenship is of paramount importance. In the United States, the need for citizenship documentation is particularly acute in light of heightened immigration enforcement. For U.S. citizens born abroad, proof of citizenship can be obtained by submitting a Form N-600 to United States Citizenship and Immigration Services, which in turn provides a Certificate of Citizenship. Although these individuals are entitled to citizenship and all of its benefits by statute, they are required to pay \$1170 in order to obtain this Certificate. This Note seeks to analyze the constitutionality of this exorbitant fee. Determination of citizenship confers with it important rights and several privileges, such as access to employment, the ability to vote and seek public office, and many other government benefits. Perhaps more importantly, determination of citizenship also confers protection—protection from detention, from removal proceedings, and from deportation. This Note analyzes the viability of a constitutional challenge to the \$1170 filing fee through a procedural due process claim, the importance of which is underscored by the life-altering consequences of citizenship as well as the benefits and protections it affords. Simply put, access to the benefits of citizenship should not turn on a citizen’s ability to pay a prohibitively expensive fee; the Constitution demands greater protections.

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INTRODUCTION

Proof of citizenship is definitively essential. It provides U.S. citizens access to the many rights and privileges that stem from citizenship, including employment, the ability to vote and travel abroad, and access to government benefits.¹ Even more importantly, proof of citizenship protects U.S. citizens from immigration detention, removal proceedings, and deportation.² Despite the incredible significance of proof of citizenship, for some U.S. citizens acquisition of proof of status is contingent on payment of an exorbitant fee.

For U.S. citizens born abroad, conclusive proof of citizenship is the Certificate of Citizenship, which can be obtained by submitting a Form N-600 application to United States Citizenship and Immigration Services (USCIS).³ Even though U.S. citizens born abroad are entitled

¹ See *Xia v. Tillerson*, 865 F.3d 643, 650 (D.C. Cir. 2017) (“[I]nvaluable benefits flow from [U.S.] citizenship, including rights to vote in federal elections, to travel internationally with a U.S. passport, to convey citizenship to one’s . . . children even if they are born abroad, to be eligible for citizen-only federal jobs, and . . . to be free of discrimination by Congress [based on] alienage.”).

² See *Poole v. Mukasey*, 522 F.3d 259, 264 (2d Cir. 2008) (“The Executive Branch may remove certain aliens but has no authority to remove citizens. An assertion of United States ‘citizenship is thus a denial of an essential jurisdiction fact’ in a deportation proceeding.” (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922))).

³ See *N-600, Application for Certificate of Citizenship Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 21, 2020), <https://www.uscis.gov/forms/n-600-application-certificate-citizenship-frequently-asked-questions> [hereinafter *N-600 Frequently Asked Questions*]. Once the application is submitted and successfully processed, USCIS determines whether the relevant statutory requirements are met and, if so, issues the applicant a Certificate of Citizenship. See *id.*

to citizenship and all of its benefits by statute,⁴ they are required to pay \$1170 in order to obtain a Certificate of Citizenship.⁵ This Certificate is the documentation that most conclusively proves a person born abroad is actually a U.S. citizen.⁶ While these citizens can apply for a passport, unlike the Certificate of Citizenship, a passport is no longer conclusive proof of citizenship in all circumstances.⁷ Citizens have presented passports as proof of citizenship to officials threatening detention, only to have them denied as conclusive proof.⁸

⁴ See 8 U.S.C. § 1401 (2018); 8 U.S.C. § 1431 (2018).

⁵ See *N-600, Application for Certificate of Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 6, 2019), <https://www.uscis.gov/n-600>. For U.S. citizens born within the country, it is their state-issued birth certificate that serves as conclusive proof of citizenship. While most states charge a slight fee for birth certificates, these fees range from \$7 to \$34. No birth certificate fee is remotely close in cost to the \$1170 fee for a Certificate of Citizenship. See *Birth Certificate Costs by State, 2018*, BALLOTPEDIA, https://ballotpedia.org/Birth_certificate_costs_by_state_2018 (last visited Apr. 20, 2020).

⁶ Citizens born abroad can also demonstrate citizenship through a passport or a Consular Report of Birth Abroad of a Citizen of the United States (Form FS-240). For a discussion on why a U.S. passport does not provide sufficient protection, as opposed to a Certificate of Citizenship, see *infra* Section I.A. Like a passport, a Consular Report of Birth Abroad (CRBA) has similar limitations. Most importantly, a U.S. citizen can only acquire a CRBA before the age of eighteen. *Birth of U.S. Citizens and Non-Citizen Nationals Abroad*, U.S. DEP'T STATE, <https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html> (last visited Apr. 20, 2020). If not acquired by the age of eighteen, the U.S. citizen must apply for a Certificate of Citizenship (or passport) if they want proof of citizenship. Equally as important, only U.S. citizens who acquire citizenship at birth qualify for a CRBA. See *id.* U.S. citizens born abroad who gain citizenship through derivative citizenship can neither apply for nor receive a CRBA as proof of citizenship.

⁷ But see 22 U.S.C. § 2705 (2018) (“The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction: . . . [a] passport . . .”); 42 C.F.R. § 436.407(a) (2018) (“*Primary evidence of citizenship and identity.* The following evidence must be accepted as satisfactory documentary evidence of both identity and citizenship: . . . [a] U.S. passport.”). For a discussion as to why a passport is no longer conclusive proof of citizenship, despite the emphatic language of these statutes, see *infra* notes 8–9 and accompanying text.

⁸ See Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlystory.html> (highlighting cases where Immigration and Customs Enforcement agents have wrongly detained U.S. citizens even after family members have provided “U.S. passports proving their citizenship”); Christie Thompson, *Citizen? Prove It.*, MARSHALL PROJECT (May 21, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/05/21/citizen-prove-it> (reporting that instances of wrongful detention of U.S. citizens often occurred, in part, due to “officials refusing to accept passports as proof”). It is unclear why Department of Homeland Security (DHS) officials do not accept passports as conclusive proof of status in all circumstances. One reason could be the proliferation of fraudulent passports. See U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-10-922T, UNDERCOVER TESTS SHOW PASSPORT ISSUANCE PROCESS REMAINS VULNERABLE TO FRAUD 5* (2010), <https://www.gao.gov/assets/130/125189.pdf> (“State’s passport issuance process continues to be vulnerable to fraud, as the agency issued five of the seven passports GAO attempted to

Circuit courts have also found individuals in possession of a passport deportable.⁹

The \$1170 fee thus functions as a financial barrier to necessary proof of status. This is especially worrisome in light of the fact that U.S. citizens born abroad are the most vulnerable population to attacks on the veracity of their citizenship.¹⁰ These foreign-born U.S. citizens have been mistakenly denied access to college financial aid, public housing programs, and important immigration benefits for their family members.¹¹ In some cases, these citizens have been mistakenly

fraudulently obtain.”). Another reason could lie in the differing levels of scrutiny of passport applications versus Certificate of Citizenship applications. *See* Claire Benoit, Note, *Force and Effect: A Look at the Passport in the Context of Citizenship*, 82 *FORDHAM L. REV.* 3307, 3336–39 (2014) (noting that the “scrutiny applied to an application for a passport is much less strict than that applied to an application for a certificate of citizenship or a certificate of naturalization”). In the same vein, DHS might refuse to accept passports as conclusive proof of status, as they do not issue passports themselves; rather, they are issued by the Department of State. *See About Us*, U.S. DEP’T STATE, <https://travel.state.gov/content/travel/en/about-us.html> (last visited Apr. 23, 2020) [hereinafter *About Us*, U.S. DEP’T STATE].

⁹ *See Hizam v. Kerry*, 747 F.3d 102, 105–06, 111 (2d Cir. 2014) (finding an individual was not a U.S. citizen, despite presenting a passport); *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013) (requiring an individual to make a preliminary showing that they are a U.S. citizen, despite presenting a passport). The courts in these cases ultimately ruled that the respondents were not actually citizens and their passports were, therefore, invalid and could not serve as conclusive proof of citizenship. *See Hizam*, 747 F.3d at 105–06, 111; *Moreno*, 727 F.3d at 260. In reaching its conclusion, the Third Circuit interpreted 22 U.S.C. § 2705, the statute governing the evidentiary value of passports, and determined it required two conditions to establish conclusive proof of citizenship: “(1) having a valid passport and (2) being a U.S. citizen.” *Moreno*, 727 F.3d at 260. The court held “that a passport constitutes conclusive proof of citizenship under 22 U.S.C. § 2705 *only if it has been issued to a U.S. citizen.*” *Id.* at 259 (emphasis added). While this may seem like an unremarkable proposition, it has devastating consequences for people in removal proceedings, perhaps best stated by Judge D. Brooks Smith in his dissenting opinion in *Moreno*. “[A] person can use a passport as conclusive evidence that she is a U.S. citizen only if she first proves that she is a U.S. citizen. At that point . . . conclusive evidence of citizenship is unnecessary, and so the statute becomes inoperative by depriving passports of any special evidentiary value.” *Id.* at 263 (Smith, J., dissenting). For a discussion on the circuit split caused by the *Moreno* decision, see Benoit, *supra* note 8, at 3322–32. As citizens must make a preliminary showing of citizenship without using their passport, they need other forms of documentation to demonstrate their status, such as a Certificate of Citizenship.

¹⁰ *See* St. John & Rubín, *supra* note 8; Press Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF Files Lawsuit Against Texas Secretary of State for Baseless Investigation of Immigrants’ Voting Eligibility (Feb. 2, 2019), <https://www.maldef.org/2019/02/maldef-files-lawsuit-against-texas-secretary-of-state-for-baseless-investigation-of-immigrants-voting-eligibility> (“The lawsuit filed last night by MALDEF (Mexican American Legal Defense and Educational Fund) says that Texas Secretary of State David Whitley singled out naturalized citizens for investigation and possible removal from voter rolls based solely on the fact that they were born outside the United States . . .”). *See generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 *VA. J. SOC. POL’Y & L.* 606 (2011) (documenting the incidence of the wrongful deportation of U.S. citizens).

¹¹ *See infra* note 30 and accompanying text.

detained by Immigration and Customs Enforcement (ICE) for years.¹² Close to 1500 U.S. citizens have been placed in immigration detention and subsequently released upon lengthy investigations into their citizenship claims since 2012.¹³ This is in part because both ICE and U.S. Customs and Border Protection (CBP) agents use birth in a foreign country as a proxy for immigration status.¹⁴ Moreover, once U.S. citizens born abroad are placed in removal proceedings, their foreign birth gives rise to a presumption of alienage, shifting the burden to the U.S. citizen to substantiate their citizenship claim.¹⁵ This can result in indigent people without a Certificate of Citizenship being forced to litigate their immigration claims with no legal counsel against trained government lawyers.¹⁶

U.S. citizens born abroad, therefore, have a significant property interest in the Certificate of Citizenship, because without it, they risk being unable to access the liberties that flow from citizenship, such as access to employment, the ability to vote and seek public office, and protection from detention, removal proceedings, and deportation.¹⁷

¹² See St. John & Rubin, *supra* note 8.

¹³ See *id.*

¹⁴ See *id.* (“The wrongful arrests also highlight a presumption that pervades U.S. immigration agencies and courts that those born outside the United States are not here legally unless electronic records show otherwise.”); see also Alexia Fernández Campbell, *Why Border Patrol Agents Can Board a Bus or Train and Ask if You’re a Citizen*, Vox (Feb. 19, 2018, 9:20 AM), <https://www.vox.com/policy-and-politics/2018/2/9/16974510/border-patrol-greyhound-bus-amtrak-train> (highlighting CBP transportation raids that begin citizenship interrogations by asking about place of birth).

¹⁵ *Matter of Tijerina-Villarreal*, 13 I. & N. Dec. 327, 330 (B.I.A. 1969) (“[O]ne born abroad is presumed to be an alien and must go forward with the evidence to establish his claim to United States citizenship.”). See Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1821–30 (2013) (discussing the difficulties of presenting a citizenship claim in removal proceedings).

¹⁶ See generally *Watson v. United States*, 865 F.3d 123, 136 (2d Cir. 2017) (Katzmann, C.J., concurring and dissenting) (“[I]mmigrants . . . have no specific right to counsel in immigration proceedings . . . [B]ut . . . U.S. citizens also have no such right . . . yet they bear the burden of establishing their citizenship . . . This case [illustrates the] . . . limited ability even a U.S. citizen has to assert a valid claim of citizenship [without] the assistance of counsel.” (internal citations omitted)).

¹⁷ Presently, other forms of documentation are equally as important. For example, DHS has launched thousands of worksite investigations in order to ensure proper work authorization under the I-9 Form. See Scott Bettridge, *Time to Prepare, South Florida: I-9 Worksite Enforcement Is on the Rise*, MIAMI HERALD (Feb. 22, 2019, 6:47 PM), <https://www.miamiherald.com/news/business/biz-monday/article226654699.html> (“I-9 audits reached 5,981 for FY18 compared to 1,360 in FY17”); Maya Srikrishnan, *The Government Has Massively Ramped Up Workplace Immigration Enforcement*, VOICE SAN DIEGO (Feb. 27, 2019, 3:10 PM), <https://www.voiceofsandiego.org/topics/government/the-government-has-massively-ramped-up-workplace-immigration-enforcement/> (“In fiscal year 2018, Homeland Security Investigations opened 6,848 worksite investigations. That’s roughly a 305 percent increase from the year before, when 1,691 investigations were opened.”).

Nonetheless, USCIS requires them to pay \$1170 to obtain the Certificate. Because of the unquestionable importance of citizenship, this Note analyzes whether the \$1170 fee could be challenged on procedural due process grounds. While there is a fee waiver system in place, it does not save the fee from constitutional scrutiny, as USCIS has severely limited access to fee waivers by narrowing fee waiver eligibility and declining hundreds of thousands of fee waiver applications.¹⁸ Access to citizenship and the critical benefits it confers should not turn on the ability to pay \$1170. These individuals are not immigrants requesting an immigration benefit; they are U.S. citizens entitled to the full protection of our Constitution.

Part I of this Note provides an overview of the Form N-600 and the Certificate of Citizenship, and details why the Certificate of Citizenship is necessary for U.S. citizens born abroad, its history and rationale for the fee, as well as why the fee waiver system is inadequate and underinclusive. Part II analyzes the fee under a procedural due process framework. Then, Part III proposes alternatives to the \$1170 fee.

I

OVERVIEW OF THE CERTIFICATE OF CITIZENSHIP

Part I overviews the history and application of the Certificate of Citizenship and the Form N-600. Section I.A discusses who benefits from the Certificate and why it is necessary. Next, Section I.B discusses how the \$1170 fee has increased over time and the justification USCIS has provided. Finally, Section I.C explains the role of fee waivers and the minimal procedural protections the fee waiver system provides.

A. *Citizens Who Benefit from the Certificate of Citizenship*

The Certificate of Citizenship is necessary for U.S. citizens born abroad who gain citizenship through one of two methods: acquired citizenship and derivative citizenship.¹⁹ Although not constitutionally granted, both of these types of citizenship are conferred by statute.²⁰ Under acquired citizenship, children born in a foreign country to U.S. citizen parents are granted citizenship.²¹ These people are citizens at

¹⁸ For a detailed discussion on the inadequacies of the fee waiver system, see *infra* Section I.C.

¹⁹ See *Jaen v. Sessions*, 899 F.3d 182, 186 (2d Cir. 2018) (discussing the difference between acquired and derivative citizenship).

²⁰ 8 U.S.C. §§ 1401, 1431 (2018).

²¹ See 8 U.S.C. § 1401. Not all children born in a foreign country to a U.S. citizen parent are granted citizenship. The statutory requirements for acquired citizenship turn on

the time of birth²² and are entitled to citizenship and all of its privileges. As of 2017, there were an estimated three million U.S. residents who had obtained citizenship through acquired citizenship.²³ Under derivative citizenship, U.S. citizens born abroad are not granted citizenship at birth.²⁴ Instead, they derive their citizenship at a later point from their parents. These individuals become U.S. citizens if their parents become citizens (such as through naturalization) or if they are adopted by U.S. citizens.²⁵ While derivative citizens are not citizens at the time of birth, they are automatically granted citizenship once the statutory requirements are met.

Even though acquired and derivative citizens are able to apply for and obtain passports as proof of status, passports provide inadequate protection compared to the Certificate of Citizenship.²⁶ To begin, the Certificate never expires, unlike passports.²⁷ More importantly, USCIS has admitted that passports only “generally” serve as evidence of U.S. citizenship.²⁸ According to the agency, a Certificate of Citizenship “may be required” to apply for certain benefits, including Social Security, driver’s licenses, financial aid, employment, and passport renewals.²⁹ Indeed, reports indicate that this is more

a variety of factors, including whether one or both parents are U.S. citizens, how long the parent(s) lived in the United States, and at what age the parent(s) left the United States. See § 1401(c)–(d), (g).

²² See § 1401; see also *United States v. Smith-Baltiher*, 424 F.3d 913, 921 (9th Cir. 2005) (“In short, if [petitioner] is entitled to U.S. citizenship as derived through his mother, his right to be treated as a citizen is not dependent upon the award of a certificate. He was a citizen from the moment of his birth.”).

²³ See *Nativity and Citizenship Status in the United States*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?g=0100000US,.04000&tid=ACSDT1Y2017.B05001&q=B05001> (last visited Apr. 22, 2020).

²⁴ See 8 U.S.C. § 1431.

²⁵ See *id.*

²⁶ Acquired and derivative citizenship can at times depend on complex factual issues that require adjudication. Thus, in some instances, a U.S. citizen might not know what their citizenship status is. See Eyder Peralta, *You Say You’re an American, but What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016, 12:29 PM), <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported> (“This is a complex problem, the official said, and many times individuals might not even know they’re citizens when they’re picked up by immigration.”). This is another important reason to have access to USCIS adjudication, and the Form N-600 fee serves as a barrier to that.

²⁷ See National Immigrant Justice Center, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 6, 2016), <https://www.regulations.gov/document?D=USCIS-2016-0001-0438> (raising concerns about a proposed change to USCIS’s fee schedule); Allan Wernick, *Immigration: It Is Not Necessary to Obtain a Certificate of Citizenship to Apply for a U.S. Passport*, N.Y. DAILY NEWS (Feb. 6, 2013, 4:00 AM), <https://www.nydailynews.com/immigration-u-s-passport-certificate-citizenship-article-1.1250531>.

²⁸ *N-600 Frequently Asked Questions*, *supra* note 3.

²⁹ *Id.*

than a mere possibility. Several immigrant rights organizations reported that clients have been required to present Certificates of Citizenship by “local Post Offices (erroneously) for passport applications; colleges and universities for students seeking financial assistance; local public housing programs; and a local USCIS office in the case of a derivative U.S. citizen applying for an immigration benefit for a family member.”³⁰ In these situations, the American citizen must then apply and pay for a Certificate of Citizenship, or be forced to forgo benefits to which they are entitled.³¹

Most importantly, Certificates of Citizenship, unlike passports, are recorded in DHS’s Systematic Alien Verification for Entitlements (SAVE) database.³² SAVE is an electronic database used to verify an individual’s immigration status by comparing the immigration information they have provided with USCIS’s records.³³ However, “SAVE can only verify information contained in immigration records.”³⁴ Since the Department of State issues passports,³⁵ the issuance of a passport is not recorded in DHS’s SAVE database.³⁶ In contrast, Certificates of Citizenship are issued by USCIS, an agency of DHS, and are recorded

³⁰ Catholic Legal Immigration Network, Inc., Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (June 21, 2016) [hereinafter Catholic Legal Immigration Network, Inc. Comment], <https://www.regulations.gov/document?D=USCIS-2016-0001-0197>; see also American Immigration Lawyers Association, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 5, 2016) [hereinafter AILA Comment], <https://www.regulations.gov/document?D=USCIS-2016-0001-0444>; Mission Waco Legal Services, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 5, 2016), <https://www.regulations.gov/document?D=USCIS-2016-0001-0443>; Massachusetts Immigrant & Refugee Advocacy Coalition, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 1, 2016) [hereinafter MIRA Comment], <https://www.regulations.gov/document?D=USCIS-2016-0001-0455>.

³¹ See Catholic Legal Immigration Network, Inc. Comment, *supra* note 30.

³² See U.S. CITIZENSHIP & IMMIGRATION SERVS., SAVE PROGRAM GUIDE 10 (2019), <https://save.uscis.gov/web/media/resourcescontents/saveprogramguide.pdf> (listing the documents that can verify an individual’s status, including the Certificate of Citizenship but omitting a U.S. passport); *The Systematic Alien Verification for Entitlements (SAVE) Program: A Fact Sheet*, AM. IMMIGR. COUNCIL (Dec. 15, 2011), <https://www.americanimmigrationcouncil.org/research/systematic-alien-verification-entitlements-save-program-fact-sheet> [hereinafter *SAVE Fact Sheet*] (“A naturalized citizen or a person who has obtained a certificate of citizenship from USCIS (or its predecessor) would have a record in immigration files.”).

³³ See *SAVE Fact Sheet*, *supra* note 32.

³⁴ *Id.*

³⁵ See *About Us*, U.S. DEP’T STATE, *supra* note 8.

³⁶ See MIRA Comment, *supra* note 30 (“Although a passport is financially more accessible, it is not always accepted by institutions and government agencies, necessitating the acquisition of a citizenship certificate. By placing access to the N-600 outside the financial reach of US citizens, these individuals could continue to appear on DHS’s Systematic Alien Verification of Entitlements”); *supra* note 32.

in SAVE.³⁷ In practice, this difference means that the status of acquired and derived citizens will not be accurately reflected in DHS's SAVE database if they only have a passport, which leaves them vulnerable to being detained by DHS.³⁸ If these Americans are placed in removal proceedings, this problem is only exacerbated: as they were born abroad, acquired and derivative citizens are presumed aliens in immigration law.³⁹ In order to overcome this presumption, they must substantiate their citizenship claims with proper documentation and evidence, which is no insignificant task. A citizen can only rebut this presumption by proving through "a preponderance of credible evidence" that they are a U.S. citizen despite their foreign birth.⁴⁰ What's worse, any "doubts [regarding their claim] 'should be resolved in favor of the United States and against' [the petitioner]" as citizenship bestows "privileges and benefits," and, "once granted, cannot lightly be taken away."⁴¹ Some courts, however, have limited the evidentiary value of passports in citizenship claims, underscoring the need for alternative proof of status like the Certificate of Citizenship.⁴² Here, derived and acquired U.S. citizens are faced with an impossible predicament: either pay an extremely high fee for a Certificate of Citizenship or be left without adequate proof of status.

In sum, acquired and derived citizens need the Certificate of Citizenship to prove their status. A passport simply does not provide the same benefits and protections that the Certificate does, yet these citizens are required to pay \$1170 to obtain the Certificate. The next Sections explore this cost, its changes over time, and the role of the fee waiver system.

B. History of Changes to the N-600 Fee

At the outset, it is important to note that USCIS is a fee-reliant agency. The Immigration and Nationality Act of 1952 (INA) authorizes DHS to charge fees that recover the full costs of adjudication and naturalization services.⁴³ USCIS has interpreted this provision of the INA to mandate the full recovery of the costs of the benefits and

³⁷ See *supra* note 32.

³⁸ See St. John & Rubin, *supra* note 8 (reporting that more than 1480 U.S. citizens were released from immigration detention since 2012 and one of the groups most at risk are acquired and derived citizens).

³⁹ See *supra* note 6 and accompanying text.

⁴⁰ *Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153, 164 (B.I.A. 2001).

⁴¹ *Berenyi v. INS*, 87 S. Ct. 666, 670–71 (1967) (quoting *United States v. Macintosh*, 283 U.S. 605, 626 (1931)).

⁴² See *supra* note 9 and accompanying text.

⁴³ See 8 U.S.C. § 1356(m) (2018) ("That fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of

services it provides. In 2007, after another increase to fees across the board, then-USCIS Director Emilio Gonzalez explained the rationale behind fee increases: “As a fee-based agency, we must be able to recover the costs necessary to administer an efficient and secure immigration system that ultimately improves service delivery, prevents future backlogs, closes security gaps, and furthers our modernization efforts.”⁴⁴ It is this mandate to recover full costs that has led to increased fees for all USCIS-provided services.⁴⁵

With regard to the Form N-600, USCIS has raised the fee substantially over the past twenty years. In 1998, USCIS set the fee at \$160.⁴⁶ After years of increases,⁴⁷ USCIS again raised the fee to \$600 in 2010, at which it remained for several years.⁴⁸ In 2016, however, USCIS raised the fee to \$1170, a ninety-five percent increase from the fee set in 2010.⁴⁹

The Form N-600 was not the only application to see an increase; in 2016, fees for all USCIS-provided immigration transactions saw an average increase of twenty-one percent.⁵⁰ According to USCIS, fees increased across the board in order to fully recoup the costs associated with the Refugee, Asylum, and International Operations Directorate (RAIO), the SAVE program, and the Office of Citizenship.⁵¹ In the 2010 rule that increased the Form N-600 fee to \$600, the agency figured it would still receive congressional apportionments to cover the costs of these programs.⁵² In fact, Congress did not apportion sufficient funds and USCIS had to cover its costs through other means,

providing all such services . . . Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.”).

⁴⁴ Press Release, U.S. Citizenship & Immigration Servs., *Building an Immigration Service for the 21st Century* (Jan. 31, 2007).

⁴⁵ See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,293 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205).

⁴⁶ Adjustment of Certain Fees of the Immigration Examinations Fee Account, 63 Fed. Reg. 43,604, 43,608 (Aug. 14, 1998) (to be codified at 8 C.F.R. pt. 103).

⁴⁷ This fee remained relatively stable for several years until 2004 when USCIS raised it to \$240, only to be raised again in 2005 to \$255. In 2007, the fee was increased again to \$460. See Adjustment of the Immigration Benefit Application Fee Schedule, 69 Fed. Reg. 20,528, 20,532 (Apr. 15, 2004) (to be codified at 8 C.F.R. pt. 103); Adjustment of the Immigration Benefit Application Fee Schedule, 70 Fed. Reg. 56,182, 56,184 (Sept. 26, 2005); Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29,851, 29,854 (May 30, 2007) (to be codified at 8 C.F.R. pt. 103).

⁴⁸ U.S. Citizenship and Immigration Services Fee Schedule, 75 Fed. Reg. 58,961, 58,964 (Sept. 24, 2010) (to be codified at 8 C.F.R. pts. 103, 204, 244 & 274A).

⁴⁹ U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 73,295.

⁵⁰ See Michele Waslin, *USCIS Fees to Increase in December*, IMMIGR. IMPACT (Oct. 26, 2016), <http://immigrationimpact.com/2016/10/26/uscis-fee-increase-2016>.

⁵¹ U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 73,293.

⁵² *Id.*

such as raising the cost of filing fees, including that of the Form N-600.⁵³

In the 2016 final rule, USCIS elaborated specifically on the Form N-600 fee increase. It attributed the new fee to a “significant increase in the number of fee waivers granted for such forms.”⁵⁴ When enacting the 2010 final rule, the agency assumed every U.S. citizen applying for the Certificate of Citizenship would pay the fee. But by 2016, only sixty-seven percent of N-600 applicants were paying the fee.⁵⁵ The decrease was attributed to applicants receiving fee waivers.⁵⁶ As a result, USCIS raised the fee in order to recover the costs of waived fees, at the expense of fee-paying citizens.⁵⁷ Since the fee increase, however, the number of N-600 applications has plummeted by the thousands. USCIS received 71,236 N-600 applications during fiscal year 2016,⁵⁸ but only received 57,341 applications during fiscal year 2019, a decrease of twenty percent.⁵⁹

The next Section demonstrates that the fee waiver system is woefully inadequate and raising the fee because of increased usage of fee waivers has failed as a matter of policy.

C. Role of Fee Waivers

USCIS offers fee waivers for a variety of forms and services it provides, including the Form N-600,⁶⁰ but it imposes strict requirements for eligibility. To be eligible under current rules, the applicant must demonstrate: (1) the applicant, their spouse, or the head of their household is currently receiving a means-tested benefit; (2) the applicant’s household income is at or below 150% of the Federal Poverty

⁵³ *Id.*

⁵⁴ *Id.* at 73,298.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Number of Service-Wide Forms by Fiscal Year to- Date, Quarter, and Form Status 2016*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2016_qtr4.pdf (last visited Apr. 24, 2020).

⁵⁹ See *Number of Service-Wide Forms Fiscal Year to- Date, by Quarter, and Form Status Fiscal Year 2019*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q1.pdf (last visited Apr. 24, 2020) [hereinafter *Number of Service-Wide Forms 2019*].

⁶⁰ See *I-912, Request for Fee Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 27, 2020), <https://www.uscis.gov/i-912>.

Guidelines at the time of filing; or (3) the applicant is undergoing financial hardship.⁶¹

The first criterion—demonstrating a means-tested benefit—is not as simple as it sounds. USCIS defines a means-tested benefit as “a public benefit where the agency granting the benefit considers your income and resources. Means-tested benefits may be federally, state, or locally funded. In general, if [the applicant] receive[s] a benefit that was granted based on [their] income, [USCIS] consider[s] it a means-tested benefit.”⁶² This definition may seem broad, but USCIS has only recognized a few benefits as means-tested, such as Medicaid, Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance to Needy Families (TANF), and Supplemental Security Income (SSI).⁶³

The Trump administration’s Public Charge rule might also limit access to fee waivers through this criterion. Under the rule, USCIS can deny an immigrant a green card if it finds it likely that the applicant is or will become reliant on public welfare.⁶⁴ While foreign-born U.S. citizens do not need green cards, these individuals might have undocumented relatives or might be confused as to who these rules affect. These rules could further limit access to fee waivers, as U.S. citizens born abroad might hesitate to apply for these means-tested benefits despite qualifying for them.

The second criterion—household income at or below 150% of the Federal Poverty Guidelines—is underinclusive. According to the Federal Poverty Guidelines, if the applicant’s household size is one person, they must make less than \$19,140 in order to meet that criterion.⁶⁵ Assuming they cannot demonstrate a means-tested benefit or financial hardship, this means a U.S. citizen born abroad in a household of one person that earns \$20,000 would be forced to pay \$1170, over one-twentieth of their annual income, to obtain proof of citizenship.⁶⁶ Even for those U.S. citizens earning more than \$20,000, a \$1170 fee is a significant financial barrier when considering the cost of living

⁶¹ *Additional Information on Filing a Fee Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 19, 2020), <https://www.uscis.gov/feewaiver>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 27, 2020), <https://www.uscis.gov/greencard/public-charge>.

⁶⁵ *See I-912P Supplement, 2020 HHS Poverty Guidelines for Fee Waiver Request*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 4, 2020), <https://www.uscis.gov/i-912p> [hereinafter *2020 HHS Poverty Guidelines*].

⁶⁶ Obtaining a Certificate of Citizenship involves other costs like legal fees. Thus, in the case of our hypothetical U.S. citizen with a \$20,000 annual income, obtaining a Certificate of Citizenship would likely cost much more than one-twentieth of their annual income.

in the United States. In 2018, the national average rent increased to \$1405 per month, a 2.9% increase from the year before.⁶⁷ The average American household spends about \$7923 on food per year, or roughly \$150 per week.⁶⁸ The cost of the Certificate of Citizenship for the average American citizen is roughly equivalent to almost a full month's rent or close to eight weeks' worth of food.

The second criterion is also underinclusive due to timing considerations. Many U.S. households simply do not have \$1170 saved at any given moment. Indeed, twenty-nine percent of households have less than \$1000 in savings.⁶⁹ If a foreign-born U.S. citizen applies for a Certificate of Citizenship for a specific purpose, such as applying for Social Security or college financial aid,⁷⁰ they might not have the funds to afford the Certificate when they actually need it. An extreme case is that of detained U.S. citizens who never even imagined detention was a possibility.

The third criterion—financial hardship—is similarly underinclusive and amorphous. USCIS notes that financial hardship can include “medical expenses of family members, unemployment, eviction, and homelessness,”⁷¹ but upon closer examination, it is clear that the threshold for eligibility is quite high. To qualify under this criterion, the applicant must demonstrate “*extraordinary* expenses or other cir-

⁶⁷ See Balazs Szekely, *National Apartment Rents Hit New Milestone, Demand for Small Apartments Catches Up with Family-Sized Rentals*, RENTCAFÉ (July 4, 2018), <https://www.rentcafe.com/blog/rental-market/apartment-rent-report/rentcafe-apartment-market-report-june-2018>. While N-600 applicants might not be paying the average amount for rent, the cost of rent could disproportionately affect them. It is clear that many N-600 applicants have low-income backgrounds. See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,298 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205) (finding that thirty-three percent of N-600 applicants qualified for a fee waiver). Low-income individuals are more rent-burdened in comparison to their non-low-income counterparts. See Jeff Larrimore & Jenny Schuetz, *Assessing the Severity of Rent Burden on Low-Income Families*, FED. RES. (Dec. 22, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.htm> (“The typical renter in the bottom quintile of the income distribution spends more than half of monthly income on rent and has less than \$500 dollars left after paying rent.”).

⁶⁸ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-19-1593, CONSUMER EXPENDITURES – 2018 (2019), <https://www.bls.gov/news.release/pdf/cesan.pdf>.

⁶⁹ See Chris Horymski, *How Much Does the Average American Have in Savings?*, MAGNIFYMONEY (Oct. 21, 2019), <https://www.magnifymoney.com/blog/news/average-american-savings>.

⁷⁰ See generally AILA Comment, *supra* note 30 (“[A] child's citizenship can easily be called into question and challenged. . . . A certificate of citizenship may help facilitate or be required to apply for benefits involving social security, state driver's licenses, military service, financial aid for college, etc.”).

⁷¹ *Instructions for Request for Fee Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/system/files_force/files/form/i-912instr-pc.pdf?download=1 (last visited Apr. 24, 2020).

cumstances affecting his or her financial situation to the degree that he or she is unable to pay the fee.”⁷² The only guidance USCIS provides as to what qualifies as an extraordinary expense is the following: “Examples include unexpected and uninsured (or underinsured) medical bills, situations *that could not normally be expected in the regular course of life events*, or a medical emergency or *catastrophic* illness affecting the individual or the individual’s dependents.”⁷³ This guidance fails to elucidate which situations and illnesses qualify. In order to meet this “extraordinary” threshold, U.S. citizens must also provide an overwhelming amount of documentation that in many instances is hard to acquire.⁷⁴ This documentation includes annual income, lists of all assets and their value, total monthly expenses and liabilities, bills and payments, medical costs, and more.⁷⁵

Even assuming the U.S. citizen applicant can meet any of these underinclusive criteria, the system is problematic because applicants are not entitled to a fee waiver. Rather, USCIS approves these requests *at its discretion*.⁷⁶ And once USCIS decides to deny a U.S. citizen a fee waiver, the decision cannot be appealed,⁷⁷ leaving citizens with two options: either pay the fee or be left without necessary proof of citizenship.

As noted in Section I.B, USCIS explained that the Form N-600 fee nearly doubled because it had approved many fee waiver applications from 2010 to 2016; specifically, thirty-three percent of N-600 applicants received them.⁷⁸ This means that thirty-three percent of U.S. citizen applicants met the eligibility criteria when the fee was still

⁷² U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0011.1, FEE WAIVER GUIDELINES AS ESTABLISHED BY THE FINAL RULE OF THE USCIS FEE SCHEDULE (2011) [hereinafter FEE WAIVER GUIDELINES] (emphasis added), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf.

⁷³ *Id.* (emphasis added).

⁷⁴ See Mallory Moench, *Albany Attorneys Say Crime Victims Denied Fee Waivers for Immigration Petitions*, TIMES UNION (Dec. 2, 2018, 7:00 PM), <https://www.timesunion.com/news/article/Crime-victims-denied-fee-waivers-for-immigration-13425089.php> (detailing that many clients of The Legal Project in Albany, New York, do not have access to necessary documentation for fee waiver applications); FEE WAIVER GUIDELINES, *supra* note 72.

⁷⁵ See *Instructions for Request for Fee Waiver*, *supra* note 71.

⁷⁶ See 8 C.F.R. § 103.7(c)(1) (2018).

⁷⁷ *Id.* § 103.7(c)(2).

⁷⁸ See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,298 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205). While this number suggests N-600 fee waivers were granted relatively frequently, USCIS does not provide the total number of N-600 fee waiver applications. Thus, while thirty-three percent of N-600 applicants received a fee waiver, the denominator of how many American citizens applied for a fee waiver is unknown. Although this data is limited, it is also quite telling. Sixty-seven percent of N-600 applicants either did not apply for a fee waiver and paid the fee or

\$600. Raising the cost in response to increased fee waiver usage fails to recognize that a substantial portion of the Americans in need of the Certificate have low-income backgrounds.⁷⁹ Indeed, any increase in the Form N-600 fee would likely result in more fee waiver applications. If the \$600 fee was a financial barrier for thirty-three percent of U.S. citizen applicants requiring a fee waiver, a ninety-five percent increase to the fee is likely prohibitively expensive to more U.S. citizen applicants.

Since the fee increase, USCIS has declined hundreds of thousands of fee waiver applications.⁸⁰ In 2016, the agency approved more than 627,000 fee waiver applications, but in 2017, that number plunged to about 285,000.⁸¹ Not only has access to fee waivers been severely curtailed, but the Form N-600 fee is now exponentially more expensive. Perhaps even more importantly, USCIS has severely narrowed fee waiver eligibility and plans to continue to do so. On December 2, 2019, USCIS removed means-tested benefits as an eligibility criterion for a fee waiver.⁸² The agency removed means-tested benefits as a criterion because states have varying income level guidelines for means-tested benefits, which are at times more generous than federal counterparts.⁸³ As a result, “individuals who would not otherwise qualify under the [federal] poverty-guideline threshold and financial hardship criteria have been granted fee waivers.”⁸⁴ This new rule severely limits access to fee waivers; as one immigrant rights organization notes, approximately two-thirds of fee waiver applicants will be affected.⁸⁵ While this rule was preliminarily enjoined on December 11,

did apply for a fee waiver, were denied, and paid the fee. This means that sixty-seven percent of applicants were forced to pay the fee to obtain necessary proof of status.

⁷⁹ See *id.* (noting that thirty-three percent of N-600 applicants qualified for a fee waiver, which is income-dependent).

⁸⁰ See Manuel Madrid, *Border Wall or No, Immigrants Will Soon Have to Scale a Paywall*, AM. PROSPECT (Jan. 23, 2019), <https://prospect.org/article/border-wall-or-no-immigrants-will-soon-have-scale-paywall>.

⁸¹ *Id.*

⁸² See *USCIS Updates Fee Waiver Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 25, 2019), <https://www.uscis.gov/news/news-releases/uscis-updates-fee-waiver-requirements>.

⁸³ See *id.*; Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 83 Fed. Reg. 49,120, 49,121 (Sept. 28, 2018).

⁸⁴ *Proposed I-912 Fee Waiver Form Revision*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 27, 2018), <https://www.uscis.gov/news/alerts/proposed-i-912-fee-waiver-form-revision>.

⁸⁵ See *Be a Fee Waiver Warrior: Don't Let USCIS Make It So Only Wealthy Immigrants Can Pursue the American Dream*, CATH. LEGAL IMMIGR. NETWORK, INC. (Oct. 22, 2018), <https://cliniclegal.org/resources/federal-administrative-advocacy/be-fee-waiver-warrior-dont-let-uscis-make-it-so-only>.

2019, the basis of the injunction was USCIS's failure to comply with the procedures required by the Administrative Procedure Act (APA).⁸⁶ Assuming USCIS complies with notice and comment rulemaking procedures, the rule will be implemented. As of the publication of this Note, the rule remains preliminarily enjoined. Additionally, USCIS is effectively trying to further limit access to fee waivers by narrowing the amount of household income that qualifies for waiver. On November 14, 2019, the agency proposed another rule that would "limit fee waivers to individuals who have an annual household income of less than 125 percent of the [Federal Poverty Guidelines]."⁸⁷ Under this rule, the aforementioned hypothetical U.S. citizen with a household size of one person and an income of 150% of the Federal Poverty Guidelines—\$19,140—would be required to pay the entire cost of the Form N-600.⁸⁸ This is particularly concerning in light of President Trump's past budget proposals. In order to reduce the deficit, President Trump's 2020 budget proposed a ten percent

⁸⁶ *City of Seattle v. Dep't of Homeland Sec.*, No. 3:19-CV-07151-MMC (N.D. Cal. Dec. 11, 2019) (order granting preliminary injunction); see also *Federal Judge Grants Nationwide Injunction in CLINIC Lawsuit, Preserves Fee Waivers Pending Litigation*, CATH. LEGAL IMMIGR. NETWORK, INC. (Dec. 13, 2019), <https://cliniclegal.org/resources/federal-judge-grants-nationwide-injunction-clinic-lawsuit-preserves-fee-waivers-pending>; Geneva Sands, *Federal Court Halts Trump Administration Changes to Fee Waiver for Citizenship*, CNN (Dec. 13, 2019, 3:04 PM), <https://www.cnn.com/2019/12/10/politics/federal-court-halts-changes-fee-waiver-for-naturalization/index.html>.

⁸⁷ U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,299 (Nov. 14, 2019).

⁸⁸ See 2020 HHS Poverty Guidelines, *supra* note 65. Fee waiver eligibility is not the only proposed change of this new rule. The rule proposes a slew of fee increases to a variety of forms, including for the first time a \$50 filing fee for the I-589, Application for Asylum and for Withholding of Removal. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. at 62,318; Camilo Montoya-Galvez, *U.S. Seeks to Hike Fees for Immigration Applications and Impose First-Ever Asylum Charge*, CBS NEWS (Nov. 9, 2019, 2:45 PM), <https://www.cbsnews.com/news/u-s-seeks-to-hike-fees-for-immigration-applications-and-impose-first-ever-asylum-charge>. As for the Form N-600, the rule actually proposes a \$155 decrease for a total of \$1015. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. at 62,317. While I encourage any reduction to the Form N-600 fee, it is clear that USCIS did not reduce the cost of the fee because it functioned as a financial barrier to U.S. citizens. On the contrary, USCIS reduced the fee "mainly [because of] the effect of the proposed limitation of fee waivers, which will enable greater cost recovery of several form types and limit the need for cost reallocation to fee-paying applicants." *Id.* at 62,318. Thus, this proposed reduction to the Form N-600 fee does not change any of the normative or legal challenges proposed by this Note. The \$155 decrease does not change the ability to access the Certificate of Citizenship because access to fee waivers has been significantly narrowed and the decrease in cost is marginal.

surcharge to immigration filing fees.⁸⁹ These filing fees already cover the cost of funding USCIS, but this proposal aimed to make both U.S. citizens and immigrants pay even more to fund government activity.⁹⁰ With potential fee increases on the horizon, access to fee waivers is more important than ever, but USCIS is limiting access to them across the board.⁹¹

Fee waivers do not provide an adequate alternative to the Form N-600 fee. USCIS approves fee waivers in very limited circumstances, forcing many U.S. citizens to either face further financial difficulties or risk being left without necessary proof of status. Coupled with the limited protection of a passport, acquired and derived citizens need access to the Certificate of Citizenship, irrespective of their ability to pay \$1170. Improving access to fee waivers could solve these severe constitutional infirmities, but a more inclusive fee waiver system imposes other logistical difficulties to be discussed *infra* in Part III. As such, the next Part proposes an avenue—including its strengths and limitations—through which to challenge the Form N-600 fee in court.

II

CHALLENGING THE FORM N-600 FEE THROUGH PROCEDURAL DUE PROCESS

While court filing fees have been litigated in both the criminal⁹² and civil⁹³ contexts, the Form N-600 fee, an agency filing fee, has

⁸⁹ See Dara Lind, *Trump's Budget Proposes Hiking Application Fees for Legal Immigrants*, Vox (Mar. 12, 2019), <https://www.vox.com/2019/3/12/18260770/immigration-fee-filing-trump-budget>. Not only has the Trump administration proposed a ten percent surcharge, but in the wake of the Covid-19 pandemic, USCIS has proposed an *additional* ten percent surcharge to filing fees to recover the lost revenue resulting from the public health crisis. Geneva Sands, *Immigration Agency Seeks Bailout, Plans to Charge More for Visa Applications*, CNN (May 18, 2020), <https://www.cnn.com/2020/05/18/politics/uscis-emergency-funding-coronavirus/index.html>.

⁹⁰ See Lind, *supra* note 89 (“What Trump is proposing is different: making immigrants pay more money so that the rest of the government can spend more.”).

⁹¹ See Madrid, *supra* note 80.

⁹² See *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that it is a violation of equal protection to incarcerate certain indigent defendants beyond the statutory limit because of their indigency); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a state cannot condition access to appellate review on a criminal defendant’s inability to pay for a trial transcript).

⁹³ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state cannot condition appellate review of a trial court’s termination of parental rights on the parent’s inability to pay record preparation fees); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (*per curiam*) (holding a filing fee that allows individuals access to judicial review of a state welfare official’s decision to lower their welfare benefits was constitutional); *United States v. Kras*, 409 U.S. 434 (1973) (holding a filing fee for discharge in bankruptcy was constitutional); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that a filing fee for divorce cases violated due process).

never been challenged in court. This Part assesses the viability of a constitutional challenge to the Form N-600 fee through a procedural due process claim. In order for U.S. citizens born abroad to acquire conclusive proof of citizenship, they must submit a Form N-600 to USCIS for adjudication. Yet, access to this adjudication—and the Certificate of Citizenship—is contingent on payment of \$1170. This procedure deprives American citizens not only of the Certificate of Citizenship, but also of the benefits and protection that flow from citizenship.⁹⁴

This Part proceeds in three sections. Section II.A provides a brief overview of procedural due process analysis in the filing fee context and a framework through which to analyze the Form N-600 fee. Section II.B establishes that the Certificate of Citizenship is a property interest that falls within the enumerated rights protected by the Fifth and Fourteenth Amendments. Finally, Section II.C applies the framework announced in *Mathews v. Eldridge*⁹⁵ and discusses whether the \$1170 fee constitutes a procedural due process violation.

A. *Overview of Procedural Due Process Analysis in the Filing Fee Context*

Procedural due process analysis begins with the Fifth and Fourteenth Amendments, which prohibit the government from depriving any person “of life, liberty, or property, without due process of law.”⁹⁶ Due process of law is only guaranteed if the enumerated rights of life, liberty, or property are involved.⁹⁷ Thus, the first inquiry in a traditional procedural due process claim is whether the interest at stake is a cognizable due process interest, which turns on whether the person has “a legitimate claim of entitlement to” the interest or benefit at stake.⁹⁸

Following this initial inquiry, a court must determine what process is due by applying the framework announced in *Mathews v.*

⁹⁴ This Note describes a facial challenge to the Form N-600 fee, but an as-applied challenge could be an appropriate judicial vehicle as well. There are, however, limitations to an as-applied challenge. Such an alternative necessarily benefits a limited number of petitioners. Other U.S. citizens would still have to pay this exorbitant fee. Furthermore, it is unrealistic that a U.S. citizen in this situation would have the resources to actually litigate this as an as-applied challenge. At some point the Form N-600 fee becomes so exorbitant that a facial challenge is the appropriate judicial vehicle. This Note argues \$1170 is well beyond that point.

⁹⁵ 424 U.S. 319 (1976).

⁹⁶ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

⁹⁷ See *Mathews*, 424 U.S. at 332.

⁹⁸ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

Eldridge, the seminal case on procedural due process. Whether additional process is required turns on the balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹⁹

After balancing these interests, the court determines whether the process in place provides sufficient procedural protections. The Supreme Court has been clear that the protections of due process are not fixed: “[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”¹⁰⁰

The analyses in *Boddie v. Connecticut*¹⁰¹ and its progeny¹⁰² are also relevant to a procedural due process claim against the Form N-600 fee, as these are the only cases involving constitutional challenges to civil filing fees (albeit in the context of court access) that have reached the Supreme Court. In *Boddie*, the petitioners alleged that a \$60 filing fee, which restricted their access to the courts to bring a divorce action since they were unable to afford it, violated their constitutional right to due process, and the Supreme Court agreed.¹⁰³ The Court's analysis relied on two distinct factors: (1) the importance of the right at stake, and (2) the State's monopoly on the ability to access that right.¹⁰⁴ Because the right to marry is considered a fundamental right and the filing fee restricted petitioners' “only avenue to dissolution of their marriages,” the State could not monopolize the only means for obtaining a divorce and deny access to its courts solely because of an inability to pay.¹⁰⁵

However, in *Boddie*, the Court did not employ the procedural due process framework found in *Mathews v. Eldridge*, as *Boddie* (and most of its progeny) predated *Mathews*. Rather, the Court employed

⁹⁹ *Mathews*, 424 U.S. at 335.

¹⁰⁰ *Id.* at 334 (internal citations omitted).

¹⁰¹ 401 U.S. 371 (1971).

¹⁰² See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam); *United States v. Kras*, 409 U.S. 434 (1973).

¹⁰³ See *Boddie*, 401 U.S. at 372, 374.

¹⁰⁴ See *id.* at 374.

¹⁰⁵ *Id.* at 376–77.

substantive and procedural due process principles.¹⁰⁶ Since *Boddie* and its progeny were decided, the Supreme Court has not had occasion to explain how these cases affect, if at all, a *Mathews* procedural due process claim in the civil filing fee context. This has resulted in federal and state courts inconsistently incorporating *Boddie* and its rationales into traditional *Mathews v. Eldridge* procedural due process claims.¹⁰⁷ Nonetheless, a review of these cases and the literature demonstrates that courts and scholars find the underlying rationale of *Boddie* and the enumerated factors therein—the importance of the interest at stake and the state’s monopoly on the ability to access that interest—relevant, albeit in different ways, to a traditional *Mathews v. Eldridge* procedural due process challenge to a civil filing fee.¹⁰⁸

¹⁰⁶ The Court in *Boddie* left unclear whether their analysis was rooted in substantive or procedural due process. Substantive due process involves challenging government conduct that “interferes with rights ‘implicit in the concept of ordered liberty,’” while procedural due process challenges the procedures through which the government interferes with those rights. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)). In *Boddie*, the Court never explained which form of due process it was invoking. Justice Harlan’s opinion suggests the Court was utilizing a substantive due process approach, but, in his concurrence, Justice Brennan stated that the holding of the Court relied on a procedural due process analysis. *Boddie*, 401 U.S. at 386 (Brennan, J., concurring). Other scholars are similarly unsure of which approach the Court employed in *Boddie*. See Christopher E. Austin, Note, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 769 (1982) (noting that *Boddie* and the line of cases that followed “did not provide a principled framework for analyzing access challenges, however, and lower courts thus have rendered many inconsistent and confusing decisions in this area”); Eric K. Weingarten, Comment, *An Indeterminate Mix of Due Process and Equal Protection: The Undertow of In Forma Pauperis*, 75 DENV. U.L. REV. 631, 636–40 (1998) (illustrating that the Justices in *Boddie* and several other cases disagree on which constitutional approach to apply).

¹⁰⁷ See *Edward B. v. Paul*, 814 F.2d 52, 55 n.2 (1st Cir. 1987) (“The *Mathews* test determines what procedural due process protections are required in an administrative hearing. Once there has been a sufficient administrative hearing, the reasoning of *Ortwein*, rather than *Mathews*, applies in respect to judicial review of the administrative proceeding.”); *Graham v. Office of Surface Mining Reclamation & Enf’t*, 722 F.2d 1106, 1111–13 (3d Cir. 1983) (separately analyzing a civil filing fee under *Mathews* and *Boddie*); *Mendoza v. Garrett*, No. 3:18-cv-01634-HZ, 2019 WL 2251290, at *4–6 (D. Or. May 16, 2019) (incorporating the *Boddie* line of cases in a *Mathews* procedural due process claim to find that “[p]overty is not a suspect class” and noting that whether a right is “a fundamental constitutional right [is] a proper consideration in the overall *Mathews* balancing inquiry”); *Crawford v. Blue*, 271 F. Supp. 3d 316, 323–28 (D. Mass. 2017) (employing the traditional *Mathews* procedural due process framework, while incorporating an analysis of a *Boddie* factor); *Whiteside v. Smith*, 67 P.3d 1240, 1248–49 (Colo. 2003) (referencing *Boddie*’s holding, but proceeding along a typical *Mathews* analysis); *Didlake v. State*, 345 P.3d 43, 47–48 (Wash. Ct. App. 2015) (incorporating the *Boddie* framework in the analysis of the first *Mathews* factor); see also Austin, *supra* note 106, at 769.

¹⁰⁸ See *supra* note 107; see also Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in M.L.B. v. S.L.J.*, 32 U. MICH. J.L. REFORM 441, 471 (1999) (noting “four crucial factors” that the Supreme Court found most relevant in challenging a civil filing fee:

Therefore, with the *Mathews v. Eldridge* framework in mind, informed by the *Boddie v. Connecticut* factors, Sections II.B and II.C assess the viability of challenging the Form N-600 fee through a procedural due process claim.¹⁰⁹

B. *The Certificate of Citizenship Is a Cognizable Property Due Process Interest*

For a procedural due process claim, the threshold requirement is demonstrating a protected liberty or property interest.¹¹⁰ The Certificate of Citizenship should be considered a protected property interest because the determination that a foreign-born U.S. citizen is entitled to the Certificate of Citizenship is not a matter of executive or administrative discretion.¹¹¹

To have a property interest in a benefit, a person must “have a legitimate claim of entitlement to it.”¹¹² The Supreme Court has recognized on numerous occasions that if the government may grant or deny a benefit at its discretion, said benefit is not a protected entitlement under the Due Process Clause.¹¹³ Rather, a “reasonable expectation of entitlement is determined largely by the language of the

“the nature of the interest at stake, the nature of the deprivation of the interest, state monopoly over vindication of the asserted interest, and absence of subsidy”); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 405 (2019) (arguing that wealth classifications, including filing fees and fines, are most appropriately analyzed under a framework of equal protection, substantive due process, and procedural due process, coined “equal process”); Austin, *supra* note 106, at 779–80 (arguing that the *Mathews* analysis functions as an alternative to an access challenge and that *Mathews* incorporates the factors identified by the Court in *Boddie*).

¹⁰⁹ This Note proposes a procedural due process challenge, instead of a substantive due process challenge, to the Form N-600 fee. While the latter might be a viable approach, there are inherent difficulties with a substantive due process claim. Perhaps most importantly, for a court to apply strict scrutiny, substantive due process requires a fundamental right to be at stake. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). While one could argue that citizenship and proof of status should be considered fundamental, the Supreme Court has been clear that it will only recognize a fundamental right if it is “explicitly or implicitly guaranteed by the Constitution.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 93 S. Ct. 1278, 1297 (1973). In a procedural due process challenge, on the other hand, the Court balances a variety of factors and is not limited by different tiers of scrutiny.

¹¹⁰ *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (explaining that the plaintiff must show a liberty or property interest protected by the Constitution).

¹¹¹ *See infra* notes 115–21 and accompanying text.

¹¹² *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

¹¹³ *See* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1989)).

statute and the extent to which the entitlement is couched in mandatory terms.”¹¹⁴

Where a foreign-born U.S. citizen proves that they meet the statutory requirements of acquired or derivative citizenship, they are entitled, as a matter of right, to that citizenship and the issuance of a Certificate of Citizenship. Acquired citizenship is governed by 8 U.S.C. § 1401, which provides that “[t]he following *shall* be nationals and citizens of the United States at birth,” and proceeds to list the various circumstances that grant citizenship.¹¹⁵ Derivative citizenship is governed by 8 U.S.C. § 1431, which provides that “[a] child born outside of the United States *automatically* becomes a citizen of the United States when all of the following conditions have been fulfilled.”¹¹⁶ Similarly, but most importantly for this Note, the actual issuance of a Certificate of Citizenship is governed by 8 U.S.C. § 1452, which provides that “such individual *shall* be furnished by the Attorney General with a certificate of citizenship,” as long as certain requirements are met.¹¹⁷ These statutes are “couched in mandatory terms,”¹¹⁸ as evidenced by the use of the words “shall” and “automatically.” If Congress wanted acquired and derivative citizenship or the issuance of a Certificate to be discretionary decisions, it would have used discretionary language, such as the word “may.”¹¹⁹ Indeed, various courts of appeals have interpreted the language of both 8 U.S.C. § 1401 and 8 U.S.C. § 1431 to be automatic grants of citizenship.¹²⁰ Therefore, the acquisition of citizenship by foreign-born U.S. citizens and the issuance of a Certificate of Citizenship are nondiscretionary determinations, because once the factual statutory requirements are met, they are entitled to the Certificate.¹²¹

¹¹⁴ *Wedges/Ledges*, 24 F.3d at 62 (quoting *Ass’n of Orange Cty. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984)).

¹¹⁵ 8 U.S.C. § 1401 (2018) (emphasis added).

¹¹⁶ 8 U.S.C. § 1431(a) (2018) (emphasis added).

¹¹⁷ 8 U.S.C. § 1452(a) (2018) (emphasis added).

¹¹⁸ *Wedges/Ledges*, 24 F.3d at 62.

¹¹⁹ *See Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1106–10 (5th Cir. 1997) (discussing the difference between “shall” and “may” in the context of statutory interpretation and finding the use of “may” allows for discretion), *partly overruled on other grounds* by *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

¹²⁰ *See generally* *Belleri v. United States*, 712 F.3d 543, 545 (11th Cir. 2013) (“A child acquires derivative citizenship by operation of law, not by adjudication. ‘No application is filed, no hearing is conducted and no certificate is issued when such citizenship is acquired.’” (quoting *Matter of Fuentes-Martinez*, 21 I. & N. Dec. 893, 896 (B.I.A. 1997))); *Lewis v. Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007) (describing derivative citizenship as “automatic”).

¹²¹ *See Hernandez v. Ashcroft*, 345 F.3d 824, 833–34 (9th Cir. 2003); *see also* *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 525–26 n.16 (9th Cir. 2012) (en banc) (contrasting the words “may” and “shall” to highlight INA § 204(b)’s mandatory nature); *Johnson v. Att’y*

Similarly, other courts have found property interests in a USCIS-adjudicated petition for the purpose of a procedural due process claim. For example, in *Ching v. Mayorkas*, the Ninth Circuit found petitioners had a property interest in the I-130, a visa petition for an immediate relative, because the decision to issue a visa is nondiscretionary.¹²² The court held that “[i]mmediate relative status for an alien spouse is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility. This protected interest is entitled to the protections of due process.”¹²³ Likewise, once a foreign-born U.S. citizen “meet[s] the statutory and regulatory requirements for eligibility” for a Certificate of Citizenship, they are entitled to it.¹²⁴

Issuance of a Certificate of Citizenship is a non-discretionary determination and U.S. citizens born abroad are entitled to the Certificate once the statutory requirements are met. Thus, it is a protected property interest, entitled to due process protections.¹²⁵

Gen., 602 F.3d 508, 510 n.2 (3d Cir. 2010) (explaining that “simply, objective factual determinations, e.g., whether ‘the alien has been physically present in the United States for a continuous period of not less than 3 years,’ or whether the alien has been ‘convicted of an aggravated felony,’ . . . are nondiscretionary” (internal citations omitted)); *Spencer Enters., Inc. v. United States*, 354 F.3d 683, 691 (9th Cir. 2003) (explaining that INA § 204(b)’s use of the word “shall” implies the provision’s nondiscretionary nature); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001) (“[T]he determination of continuous physical presence is not subject to the agency’s discretion, but is a matter of applying the law to the facts of the case.”).

¹²² 725 F.3d 1149, 1156 (9th Cir. 2013); *see also* *Chahal v. U.S. Citizenship & Immigration Servs.*, No. C18-312-RAJ, 2019 WL 1056518, at *7 (W.D. Wash. Mar. 6, 2019) (“Because siblings of U.S. citizens are recognized family-sponsored immigrants under 8 U.S.C. § 1153(a)(4), the I-130 petitions for immediate relative status for these individuals enjoy the same status as those for alien spouses. Both are protected interests entitled to the protections of due process.” (citing *Ching*, 725 F.3d at 1156)); *Zizi v. Bausman*, 306 F. Supp. 3d 697, 708 (E.D. Pa. 2018) (finding “the ‘grant of an I-130 petition . . . is a nondiscretionary decision. Immediate relative status . . . is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility. This protected interest is entitled to the protections of due process’” (quoting *Ching*, 725 F.3d at 1156)); *Cplash v. Johnson*, 230 F. Supp. 3d 128, 139 (W.D.N.Y. 2017) (“[T]his Court holds that a constitutionally protected property interest attaches to 8 U.S.C. § 1154(b), and, by extension, to the adjudication of Plaintiff’s Form I-130 petition.”).

¹²³ *Ching*, 725 F.3d at 1156.

¹²⁴ *Id.*

¹²⁵ *See* *Bangura v. Hansen*, 434 F.3d 487, 496 n.2 (6th Cir. 2006) (“Supreme Court precedent makes clear that non-discretionary statutes create property interests for the purpose of procedural due process.” (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005))). While this Note contends foreign-born U.S. citizens have a property interest in the Certificate of Citizenship, it is worth mentioning that there is arguably a liberty interest at stake here as well. Citizenship and proof of citizenship in the immigration enforcement context implicate U.S. citizens’ physical liberty, because they ensure one’s freedom from detention, deportation, and exclusion.

C. *The Form N-600 Fee as a Procedural Due Process Violation Under Mathews v. Eldridge*

After establishing that the Certificate of Citizenship is a protected property interest, the next step is determining whether additional process is due by balancing the *Mathews v. Eldridge* factors, including the private interest at stake and its importance, the risk of erroneous deprivation of that interest through the procedures used, and the government's interest.¹²⁶ This Section will analyze each factor in turn.

1. *U.S. Citizens Have a Substantial Property Interest in a Certificate of Citizenship*

At the outset it is important to note the inextricable link between citizenship and proof of citizenship. While the presence or absence of the latter definitively has no effect on an individual's citizenship,¹²⁷ it is certainly not without dire consequences. "Without proof of one's citizenship, for example, a person will be unable to travel abroad, or to establish entitlement to the many other rights and privileges of citizenship."¹²⁸ In the case of U.S. citizens born abroad, without a Certificate of Citizenship, they cannot access these many other rights and privileges of citizenship, which in turn infringes on their incontrovertible right to citizenship. Thus, the property interest U.S. citizens born abroad have in the Certificate of Citizenship is the ability to access the benefits of their citizenship.

This interest weighs heavily in the U.S. citizen's favor under *Mathews v. Eldridge* balancing:

Many invaluable benefits flow from United States citizenship, including rights to vote in federal elections, to travel internationally with a U.S. passport, to convey citizenship to one's own children even if they are born abroad, to be eligible for citizen-only federal jobs, and, indeed to be free of discrimination by Congress on the basis of alienage.¹²⁹

The ability to access these benefits turns on proof of status. Immigrant rights organizations have confirmed this through reports from

¹²⁶ 424 U.S. 319, 335 (1976).

¹²⁷ See *Xia v. Tillerson*, 865 F.3d 643, 652 (D.C. Cir. 2017) ("Even though administrative cancellation of a certificate of naturalization or passport cannot affect an individual's citizenship, those actions nevertheless have consequences."); *United States v. Smith-Baltiher*, 424 F.3d 913, 921 (9th Cir. 2005) ("In short, if [petitioner] is entitled to U.S. citizenship as derived through his mother, his right to be treated as a citizen is not dependent upon the award of a certificate. He was a citizen from the moment of his birth.").

¹²⁸ *Xia*, 865 F.3d at 652.

¹²⁹ *Id.* at 650.

their clients who were denied benefits because they did not have a Certificate of Citizenship.¹³⁰ These benefits touch nearly every aspect of a U.S. citizen's life. Were a U.S. citizen unable to access these benefits, they might not be able to secure housing, find employment, finance an education, or vote for a state or federal representative, which are all undeniably important privileges of citizenship.

The ability to access other benefits also turns on proof of status. The most critical benefit of citizenship is freedom from immigration detention and deportation. Yet, foreign-born U.S. citizens are incredibly vulnerable to wrongful immigration detention.¹³¹ Throughout the period of detention, these U.S. citizens are separated from their families, unsure of whether they will be released or deported from their own country. One example of this is the case of Davino Watson, a foreign-born U.S. citizen who was wrongfully detained by ICE for 1273 days.¹³² While his case was plagued by many other issues,¹³³ his ICE officer explicitly said he “would have found [Watson] to be deportable due to the lack of a certificate of citizenship.”¹³⁴ As another U.S. citizen who was wrongly detained described the situation: “For ICE, it’s like, ‘Oops, we made a mistake,’ But for me on the other end, it tears up your life.”¹³⁵ Watson’s case and those of others like him thus illustrate the significance of the interest which foreign-born U.S. citizens have in the Certificate of Citizenship; Watson likely never would have been placed in immigration detention if he had had a Certificate. Acquired and derived citizens, like Watson, are also at risk of deportation without proof of status. The Supreme Court has recognized how detrimental deportation can be to a citizen: “To deport one who so claims to be a citizen, obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living.”¹³⁶

¹³⁰ See *supra* note 30 and accompanying text.

¹³¹ See *supra* notes 10, 12–13 and accompanying text.

¹³² See Darlena Cunha, *ICE Is Dangerously Inaccurate*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/ice-raids.html>; St. John & Rubin, *supra* note 8.

¹³³ Not only did the ICE agents mistakenly request the wrong alien files for Watson’s parents, but an intervening Board of Immigration Appeals (BIA) decision undermined his citizenship claim. For a full factual discussion of Watson’s case, see *Watson v. United States*, 179 F. Supp. 3d 251, 261–69 (E.D.N.Y. 2016).

¹³⁴ *Id.* at 263–64. Unfortunately, this is not the end of Watson’s story. After his release, he sued the federal government under the Federal Tort Claims Act. He was awarded \$82,500 in damages, but the Second Circuit Court of Appeals held that Watson’s legal claims were time-barred by the relevant statute of limitations, which expired while he was still in immigration detention. See *Watson v. United States*, 865 F.3d 123, 126–27 (2d Cir. 2017); St. John & Rubin, *supra* note 8.

¹³⁵ St. John & Rubin, *supra* note 8.

¹³⁶ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

The analysis in *Boddie v. Connecticut* also supports the conclusion that the property interest in the Certificate of Citizenship is significant. There, the Court looked to the importance of the right at stake to determine whether the petitioner could be constitutionally required to pay a fee to exercise that right. In *Boddie*, the Court used the classification of marriage as a fundamental right as a proxy to find that “marriage involves interests of basic importance in our society” such that its dissolution could not be conditioned on payment of a fee.¹³⁷ While the Supreme Court has never affirmatively categorized citizenship or the benefits of citizenship as fundamental rights in its substantive due process or equal protection jurisprudence, the Court has repeatedly recognized the incredible significance of citizenship through dicta in several denaturalization and expatriation cases decided in the latter half of the twentieth century.¹³⁸ In *Afroyim v. Rusk*, the Court held that the Fourteenth Amendment guarantees U.S. citizens the “constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship.”¹³⁹ The Court found it is not within the government’s power to strip an American of their U.S. citizenship.¹⁴⁰ In fact, upon analyzing the language and history of the Fourteenth Amendment, the Court found an indisputable intent of the Amendment’s framers to “put citizenship beyond the power of any governmental unit to destroy.”¹⁴¹ The Court went on to recognize the incredible importance of U.S. citizenship:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is part of a cooperative affair. Its citizenry is the country and the country is its citizenry.¹⁴²

Since *Afroyim*, the Supreme Court has repeatedly emphasized the importance of citizenship and its benefits. In *Schneiderman v. United States*, the Court clearly articulated the importance of U.S. citizenship: “[N]owhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be

¹³⁷ *Boddie v. Connecticut*, 401 U.S. 371, 376, 382–83 (1971).

¹³⁸ See *Afroyim v. Rusk*, 387 U.S. 253, 259–67 (1967); *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964).

¹³⁹ 387 U.S. at 268.

¹⁴⁰ *Id.* at 263–67.

¹⁴¹ *Id.* at 263.

¹⁴² *Id.* at 267–68.

difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men.”¹⁴³

Thus, the property interest foreign-born U.S. citizens have in the Certificate of Citizenship is incredibly substantial. It involves the right to federal employment, the right to travel abroad, the right to vote, the right to access immigration benefits, the right to be free from immigration detention, and all the other liberties that flow from citizenship.¹⁴⁴ A reviewing court, therefore, would find that the property interest at stake tips the balance heavily in favor of more procedural protections. The following Section proceeds along the *Mathews v. Eldridge* framework to discuss the risk of erroneous deprivation and the government’s interest in the Form N-600 fee.

2. *The Risk of Erroneous Deprivation Demands Greater Procedural Protections*

The second factor in the balancing test is the risk of erroneous deprivation of the Certificate of Citizenship through the procedures used—namely, the \$1170 fee.

The risk of erroneous deprivation is complicated by the availability of a fee waiver. In the case of foreign-born U.S. citizens who cannot pay the fee and whose fee waiver applications are denied, the risk of erroneous deprivation is one hundred percent because the Form N-600 fee is required to even access the USCIS adjudication. Thus, if a U.S. citizen born abroad does not pay the Form N-600 fee, they are automatically deprived of conclusive proof of their status because USCIS will not process the application unless the fee is paid.¹⁴⁵ This runs afoul of the due process requirement that “some form of hearing is required before an individual is finally deprived of a property interest.”¹⁴⁶

On the other hand, those U.S. citizens born abroad whose fee waiver applications are approved can still access the Certificate of Citizenship. The fee waiver provides greater procedural protections because indigent U.S. citizens can still acquire a Certificate of Citizenship, despite their indigence. However, as discussed *supra* in Section I.C, the USCIS fee waiver system is severely deficient. The eligibility requirements for a fee waiver are strict and underinclusive,

¹⁴³ 320 U.S. 118, 122 (1943).

¹⁴⁴ See *supra* note 1 and accompanying text.

¹⁴⁵ See *N-600, Application for Certificate of Citizenship*, *supra* note 5 (“When you send a payment, you agree to pay for a government service. Filing and biometric service fees are final and non-refundable, regardless of any action we take on your application, petition, or request, or if you withdraw your request.”).

¹⁴⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

which risks leaving many U.S. citizens ineligible for a fee waiver and, as a result, a Certificate of Citizenship. In 2016, USCIS raised the Form N-600 fee by ninety-five percent,¹⁴⁷ which means that more U.S. citizens *should* be eligible for fee waivers than before the increase. But in reality, USCIS has declined hundreds of thousands of fee waiver applications.¹⁴⁸ Moreover, with the proposed changes to the fee waiver system, including narrowing even further fee waiver eligibility and increasing immigration filing fees by ten percent,¹⁴⁹ the risk of erroneous deprivation will only grow higher. Thus, as USCIS begins denying hundreds of thousands of fee waiver applications,¹⁵⁰ the fee waiver system appears to not necessarily lessen the risk of erroneous deprivation.

Indeed, when USCIS proposed the 2016 fee increase, some immigrant rights organizations expressed their concern that the \$1170 fee would prevent U.S. citizens from accessing the Certificate. For example, the American Immigration Lawyers Association wrote that “[i]ncreasing the fee to \$1,170 will deter already reluctant families and negatively impact thousands of adopted children.”¹⁵¹ The Massachusetts Immigrant and Refugee Advocacy Coalition shared similar concerns: “Such a significant increase . . . would put it out of reach for many of our clients who do not qualify for a fee waiver. These . . . people . . . are already US citizens; they are not seeking an immigration benefit, rather are solely seeking evidence of their citizenship status”¹⁵²

The *Boddie v. Connecticut* factors also provide a useful lens to analyze the risk of deprivation. In *Boddie*, the Supreme Court found the filing fee violated due process in part because the state monopolized the only means to obtain a divorce.¹⁵³ Likewise, the U.S. government has a monopoly over the only means to obtain a Certificate of Citizenship. USCIS is “the only forum effectively empowered to” provide citizens born abroad with this necessary proof of status.¹⁵⁴ Mandating a prohibitively high fee while limiting access to vital fee waivers violates due process because foreign-born citizens may be deprived of their only avenue to a Certificate of Citizenship solely because of their inability to pay.

¹⁴⁷ U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,295 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205).

¹⁴⁸ See Madrid, *supra* note 80.

¹⁴⁹ See *supra* notes 82–91 and accompanying text.

¹⁵⁰ See Madrid, *supra* note 80.

¹⁵¹ AILA Comment, *supra* note 30.

¹⁵² MIRA Comment, *supra* note 30.

¹⁵³ 401 U.S. 371, 374 (1971).

¹⁵⁴ *Id.* at 376.

Even though the risk of erroneous deprivation is difficult to quantify, the availability of a fee waiver does not meaningfully alter this risk in light of the system's deficiencies. While some courts have found the availability of a fee waiver to be an important factor in deciding a procedural due process claim to a filing fee,¹⁵⁵ other courts have stated that a deficient fee waiver system can render a filing fee unconstitutional.¹⁵⁶ The purpose of a fee waiver is to ensure that even indigent applicants can receive the benefit sought. That same purpose is undermined when USCIS is both denying hundreds of thousands of fee waiver applications and is curtailing fee waiver eligibility. The availability of a waiver thus cannot be dispositive of the constitutional inquiry. Finding otherwise would essentially insulate fees from judicial review as long as the government implemented even the most under-inclusive fee waiver system. Moreover, the government's monopoly of the means to acquire the Certificate of Citizenship underscores the need for greater procedural protections.

3. *The Government's Interest in Funding USCIS Weighs in Its Favor*

The final factor—the government's interest at stake—weighs in the government's favor, albeit to an uncertain extent. As the Form N-600 fee helps fund USCIS, the government has a substantial interest in charging U.S. citizens for Certificates of Citizenship.

Since USCIS is a fee-reliant agency, it has an interest in offsetting the administrative costs of adjudicating all N-600 applications and the INA authorizes it to do just that.¹⁵⁷ Moreover, USCIS increased filing fees across the board to cover the costs associated with RAIO, the SAVE program, and the Office of Citizenship, without any more congressional apportionments.¹⁵⁸ USCIS also determined that raising the Form N-600 fee to \$1170 would allow it to recoup all costs associated with its adjudication, in light of increased N-600 fee waiver applications during the preceding years.¹⁵⁹ While immigrant rights organizations have questioned the propriety of funding USCIS through filing

¹⁵⁵ See, e.g., *Crawford v. Blue*, 271 F. Supp. 3d 316, 324–28 (D. Mass. 2017); *Didlake v. State*, 345 P.3d 43 (Wash. Ct. App. 2015).

¹⁵⁶ See *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 72 (D.D.C. 2015) (“It follows that MPD’s alleged practice of impeding bond waivers and reductions, if true, would make the District’s forfeiture system unconstitutional as applied to those claimants because it denies them an opportunity to exercise their fundamental right to contest the seizure of their property.”).

¹⁵⁷ See *supra* note 43 and accompanying text.

¹⁵⁸ U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,293 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205).

¹⁵⁹ *Id.* at 73,298.

fees¹⁶⁰ and the necessity of raising the Form N-600 fee by nearly one hundred percent,¹⁶¹ under USCIS's current fee structure, its interest in the Form N-600 fee weighs in the government's favor.

Nevertheless, the fiscal and administrative interest the government has in the Form N-600 fee must be weighed against the significant property interest foreign-born U.S. citizens have in the Certificate of Citizenship. The Certificate allows Americans to access the liberties at the center of our society, including voting, employment, access to health care, government benefits, and protection from deportation. Because one cannot enjoy the privileges of citizenship without proof of status, considerations such as costs should give way to the interest U.S. citizens have in the Certificate of Citizenship. The Constitution should prioritize more important values over cost recoupment.

The government itself also has an interest in ensuring its citizens have proper documentation of status. When acquired and derived citizens have access to a Certificate of Citizenship, they can contribute economically by working in citizen-only federal jobs and accessing other governmental benefits. They can engage in and contribute to political discourse by voting. As immigration detention costs the government \$133.99 per day per adult, the government could additionally save its limited financial resources by lessening the risk of mistakenly detaining a U.S. citizen.¹⁶²

Furthermore, the *Mathews v. Eldridge* balancing scheme weighs "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁶³ As discussed *infra* in Part III, USCIS has several additional or substitute procedural requirements to the \$1170 fee that would allow it to recoup the costs associated with adjudicating N-600 applications. Each proposed alternative is based on procedures USCIS already implements in relation to other immigration applications, such as expedited processing for an increased fee, a fee scale, or adjudication at no cost to the applicant.¹⁶⁴ While their

¹⁶⁰ See AM. IMMIGRATION LAWYERS ASS'N, AILA ISSUE PAPER: IMMIGRATION AND THE DEPARTMENT OF HOMELAND SECURITY 4 (2004) [hereinafter AILA ISSUE PAPER], <https://www.aila.org/File/DownloadEmbeddedFile/40618> ("AILA long has supported direct congressional appropriations to supplement the user fees that almost totally fund the USCIS today.").

¹⁶¹ See *supra* note 30.

¹⁶² Jaden Urbi, *This Is How Much It Costs to Detain an Immigrant in the US*, CNBC (June 21, 2018), <https://www.cnn.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html>.

¹⁶³ 424 U.S. 319, 335 (1976).

¹⁶⁴ See *infra* Part III.

implementation might be burdensome to a certain extent, these alternatives are not fiscally or administratively prohibitive. As such, these alternatives also weigh against the government's interest in the Form N-600 fee.

Thus, under the *Mathews v. Eldridge* framework, the first factor—the interest at stake—weighs heavily in favor of more procedural protections. The second factor—the risk of erroneous deprivation—arguably could fall in either direction, but with the clear deficiencies in the fee waiver system and the government's monopoly over the means of acquiring proof of status, the risk seems to pull towards greater procedural protections. Finally, the third factor—the government's interest—weighs in the government's favor, as filing fees are USCIS's funding source. Yet, due to the importance of citizenship, the availability of administrative alternatives, and the government's own interest in ensuring its citizens have proof of status, cost recoupment should not override the property interest citizens have in the Certificate of Citizenship. Balancing these factors together, procedural due process principles should counsel in favor of securing broader access to proof of citizenship.

U.S. citizens born abroad should have greater procedural protections against an exorbitant \$1170 fee and a deficient fee waiver system. The next Part proceeds under the assumption that a court finds greater procedural protections are required. In order for USCIS to provide these greater protections, the agency would need to make up for the lost funds from the Form N-600 fee. The following Part discusses methods through which USCIS could provide greater procedural protections through alternatives to the \$1170 fee.

III

ALTERNATIVES TO THE FORM N-600 FEE

The previous Part established the viability of challenging the Form N-600 fee through a procedural due process claim. It argued that U.S. citizens' property interest in the Certificate of Citizenship is a cognizable due process interest, which could survive *Mathews v. Eldridge* balancing and require greater procedural protections. The most obvious additional or substitute procedural safeguard would be an improved fee waiver system. This system would involve expanding the criteria for eligibility, making fee waivers mandatory rather than discretionary, and creating an administrative appeals process. This solution, however, would create a variety of other issues.¹⁶⁵ In an

¹⁶⁵ An improved fee waiver system is, perhaps, the easiest constitutional cure to implement, but from a normative perspective not the right one. Regardless of income, no

improved fee waiver system, more applicants, not just those applying for a Certificate of Citizenship, would have greater access to fee waivers. This increase in approved fee waivers would force USCIS to swallow the costs of adjudicating a larger amount of applications that would not be limited to the Form N-600.

Another solution would be for Congress to simply apportion more money to USCIS. Immigrant advocates have long criticized USCIS's user-funded framework.¹⁶⁶ They argue that budget independence makes the agency less attuned to the need for reasonable fees for its services and creates perverse incentives to maintain already unaffordable fees.¹⁶⁷ These immigration allies contend that these issues could be ameliorated through congressional apportionments.¹⁶⁸ Yet, this solution is unlikely for a myriad of reasons. Perhaps most importantly, in our current political climate immigration remains an incredibly controversial topic. Bipartisan support for providing USCIS with more congressional apportionments is unlikely. Moreover, if this issue were litigated in court, a judge could be reluctant to force Congress to apportion more federal funds to USCIS, as deciding how much to appropriate to agencies falls squarely within Congress's purview.¹⁶⁹

Another solution could involve the passport. As mentioned *supra*, some courts have stripped the passport of its conclusive evidentiary value in citizenship claims.¹⁷⁰ A reviewing court could reverse themselves or could enjoin DHS to accept passports as conclusive proof of citizenship. But even assuming a reviewing court would do either of these things, this solution fails to account for all the other protections a Certificate of Citizenship affords that a passport does not. U.S. citizens have been deprived of many other important rights because they needed a Certificate of Citizenship that they did not

U.S. citizen should be forced to pay an exorbitant fee for necessary proof of status. The fee functions as a barrier to the rights of citizenship and discriminates against foreign-born U.S. citizens.

¹⁶⁶ See AILA ISSUE PAPER, *supra* note 160.

¹⁶⁷ See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING (2015), <https://crsreports.congress.gov/product/pdf/R/R44038/3> ("Some contend that such budget independence also makes the agency less responsive to the need for affordable user fees and timely and effective customer service.").

¹⁶⁸ See AILA ISSUE PAPER, *supra* note 160, at 4 ("Such direct congressional appropriations are necessary in order to ensure that the USCIS adequately delivers services and admits into our country the appropriate people while barring those who mean to do us harm.").

¹⁶⁹ See U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

¹⁷⁰ See *supra* note 9 and accompanying text.

have.¹⁷¹ Additionally, passports expire and are not recorded in DHS databases, further highlighting the need for a Certificate of Citizenship.¹⁷²

As an improved fee waiver system, increased congressional apportionments, and wider acceptance of the passport do not fully cure the constitutional defects at play, this Part provides three different alternatives through which USCIS could reduce or eliminate the N-600 fee, while minimizing the “fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail.”¹⁷³ First, Section III.A raises the option of expanding USCIS’s premium processing service, which expedites the processing of certain forms for an increased price.¹⁷⁴ Second, Section III.B discusses the possibility of a fee scale in which USCIS would consider an applicant’s ability to pay and set the fee accordingly. And third, Section III.C considers a completely eliminated fee, as is done with other forms such as those for refugees and asylum seekers. While each alternative raises its own issues as to implementation and potential side effects, this Part aims to demonstrate that there are methods to reduce or eliminate the Form N-600 fee while surviving *Mathews v. Eldridge* balancing.

A. *Extending USCIS’s Premium Processing Service*

Under USCIS’s current user-funded framework, premium processing allows individual applications to be adjudicated within a shorter time for an increased fee.¹⁷⁵ The agency guarantees fifteen-calendar-day processing if the applicants choose to pay \$1440 in addition to the base filing fee.¹⁷⁶ Only two forms are currently eligible for premium processing: Form I-129, Petition for a Nonimmigrant Worker, and Form I-140, Immigrant Petition for Alien Worker.¹⁷⁷ Pre-

¹⁷¹ See *supra* note 30 and accompanying text.

¹⁷² See *supra* Section I.A.

¹⁷³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁷⁴ See *How Do I Request Premium Processing?*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 27, 2020), <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; *I-907, Request for Premium Processing Service*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 16, 2020), <https://www.uscis.gov/i-907>. The average processing time for most USCIS-adjudicated applications extends far beyond fifteen calendar days. See *Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://egov.uscis.gov/processing-times/historic-pt> (last visited Mar. 13, 2020). As for the Form N-600, the average processing time was 8.4 months during fiscal year 2019. *Id.*

¹⁷⁷ *How Do I Request Premium Processing?*, *supra* note 174. Form I-129 is filed to allow a nonimmigrant worker to enter and live temporarily in the United States to perform services or to receive certain training. Form I-140 is used to petition for an immigrant

mium processing has proven to be a major source of revenue for the agency.¹⁷⁸

Extending this service to other forms and applications could generate enough revenue to lower the costs of the Form N-600 fee and other applications as well. USCIS has already recognized that the revenue from premium processing allows it “to continue making necessary investments in staff and technology to administer various immigration benefit requests more effectively and efficiently.”¹⁷⁹ The agency has also previously made announcements that it would be extending the service to other forms and visa categories, such as the EB-1 visa category for multinational executives and managers.¹⁸⁰ Despite these announcements, USCIS has yet to extend premium processing to any other form.

Immigration advocacy organizations have called for the expansion of premium processing before.¹⁸¹ In fact, in response to the 2016 proposed rule to increase fees for USCIS-adjudicated forms, many organizations submitted comments urging the agency to extend the service to other forms in lieu of increased fees.¹⁸² USCIS did not extend the service for two reasons. It noted that several adjudications involved timing considerations that USCIS does not have control over.¹⁸³ “[B]ackground checks, the timing of which are not controlled by USCIS, are required for: The Application for Temporary Protected

worker to become a U.S. lawful permanent resident. The availability for premium processing for Form I-140 is also limited to certain visa categories. Noncitizens cannot use premium processing if they are filing for an EB-1 visa for multinational executives and managers or an EB-2 visa for members of professions with advanced degrees or exceptional ability seeking a National Interest Waiver. *Id.*

¹⁷⁸ See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,309 (Oct. 24, 2016) (to be codified at 8 C.F.R. pts. 103, 204 & 205) (“[F]orecasted premium processing revenue is sufficient to cover the projected costs of providing the premium service and other permissible infrastructure investments.”).

¹⁷⁹ *USCIS Adjusting Premium Processing Fee*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Aug. 31, 2018), <https://www.uscis.gov/news/news-releases/uscis-adjusting-premium-processing-fee> (quoting USCIS’s Chief Financial Officer).

¹⁸⁰ See Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation (Aug. 2, 2011), <https://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job>.

¹⁸¹ See AILA Comment, *supra* note 30, at 3–4.

¹⁸² See *id.*; Catholic Legal Immigration Network, Inc. Comment, *supra* note 30; Tony Cardenas et al., Members of Congress, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 6, 2016), <https://www.regulations.gov/document?D=USCIS-2016-0001-0461>; Naturalization Working Group, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (July 6, 2016), <https://www.regulations.gov/document?D=USCIS-2016-0001-0446>.

¹⁸³ See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 73,309.

Status, Form I-821; the Application for Naturalization, Form N-400; the Application for Provisional Unlawful Presence Waiver, Form I-601A; and the Application to Register Permanent Residence or Adjust Status, Form I-485.”¹⁸⁴ Additionally, USCIS stated, “[W]here expedited processing may be possible, it would be extraordinarily time-intensive to determine the appropriate fee amount, target adjudication timeframe, and staffing levels needed to implement a new expedited processing program.”¹⁸⁵

These justifications are equally unavailing in the face of the grave constitutional concerns of depriving U.S. citizens of access to proof of citizenship. Even if certain timing limitations are not within the agency’s control, USCIS can adjust the fifteen-day turnover rate for forms that require longer periods of adjudication. While this might be a feasible way to extend the service, it is also clear that background checks and their timing limitations are not dispositive of premium processing eligibility. The I-140, one of the two forms that is currently eligible for premium processing, can at times require an FBI background check.¹⁸⁶ If USCIS can still provide premium processing to an I-140 application that requires a background check, it seems that the timing limitations of these checks are not as inflexible as the agency suggested.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* It is true that expanding premium processing is not the easiest alternative. One need look no further than the rigmarole of USCIS suspending, reimplementing, and resuspending premium processing for H-1B petitions. *USCIS Announces Temporary Suspension of Premium Processing for FY2021 Cap-Subject Petitions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 16, 2020), <https://www.uscis.gov/news/alerts/uscis-announces-temporary-suspension-premium-processing-fy2021-cap-subject-petitions>. The agency suspended the service in light of the sheer volume of premium processing requests and its effect on long-pending H-1B petitions. *See id.*; *USCIS Will Temporarily Suspend Premium Processing for All H-1B Petitions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 3, 2017), <https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions>. While this saga might suggest USCIS could not effectively manage a premium processing expansion, it is important to recognize that the agency typically receives about 400,000 H-1B petitions per fiscal year. *I-129 – Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014 – December 31, 2019*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last visited Mar. 17, 2020). The agency does not receive nearly as many petitions for other forms, including the Form N-600, of which only 57,341 petitions were filed during fiscal year 2019. *Number of Service-Wide Forms 2019*, *supra* note 59. Expanding premium processing to forms not as numerous as the H-1B could ameliorate the issues surrounding H-1B premium processing eligibility.

¹⁸⁶ *Instructions for Petition for Alien Workers*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 9, 2018), <https://www.uscis.gov/sites/default/files/document/forms/i-140instr.pdf> (“USCIS may . . . at any time . . . conduct background and security checks, including a check of criminal history records maintained by the Federal Bureau of Investigation (FBI), before making a decision on your application or petition.”).

USCIS also indicated that it would be “extraordinarily time-intensive” to determine how to extend the service to other forms.¹⁸⁷ While this may be true, the constitutional rights at stake should not be restricted due to timing or financial concerns. Foreign-born U.S. citizens risk immigration detention and the inability to access the liberties that flow from citizenship, including federal loans, public housing programs, and immigration benefits for their family members.¹⁸⁸ These rights should not turn on timing limitations or financial concerns.¹⁸⁹ USCIS could use a portion of the funds already generated through premium processing to study the feasibility of this option.¹⁹⁰

B. *Creating a Fee Scale*

Another alternative involves a fee scale in which a USCIS officer considers the applicant’s ability to pay and sets the fee accordingly.

This is a particularly attractive alternative because USCIS already performs many functions necessary for its implementation. The agency already considers an applicant’s financial background when adjudicating a fee waiver application. For a fee scale alternative, USCIS would likely consider a larger breadth of documentation, including any means-tested benefits, financial hardships, annual income, number of dependents, and more. Further, USCIS already has a fee scale-like alternative for one of its forms: the N-400, Application for Naturalization. The agency allows applicants to submit an I-942 to request the filing fee be reduced from \$640 to \$320.¹⁹¹ USCIS considers the applicant’s marital status, household size, household income, employment status, annual income, federal tax returns, unemployment benefits, and any other documentation

¹⁸⁷ See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 73,309.

¹⁸⁸ See *supra* notes 11–13, 30, 133–36 and accompanying text.

¹⁸⁹ See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency.”). The main drawback of extending premium processing is that by definition it privileges the wealthy. All immigrants should be welcome to apply to USCIS for an immigration benefit, regardless of their economic background. This alternative merely demonstrates that there are methods to reduce or eliminate the Form N-600 fee, without USCIS absorbing the entire cost of adjudication.

¹⁹⁰ See AILA Comment, *supra* note 30.

¹⁹¹ See 8 C.F.R. § 103.7(b)(1)(i)(BBB) (2018) (providing that, while the standard fee is \$640, “[t]he fee for an applicant whose documented income is greater than 150 percent and not more than 200 percent of the Federal poverty level is \$320”); *I-942, Request for Reduced Fee*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 13, 2020), <https://www.uscis.gov/i-942>.

regarding financial assistance.¹⁹² This alternative could be extended to other forms, such as the Form N-600.

Immigration advocates have suggested a fee scale option before.¹⁹³ The drawback of such an alternative involves cost recoupment. As previously mentioned, nearly all of USCIS's budget comes from filing fees. Implementing a fee scale for the N-600 might affect USCIS's ability to recoup all of its costs. However, USCIS has generated a surplus of at least \$92 million since 2009, which could be used to defray the costs from implementation of a fee scale.¹⁹⁴ The surplus has been exclusively used to the benefit of permanent residents and helping them apply for citizenship.¹⁹⁵ From that surplus, \$10 million was awarded to organizations across the country to help 25,000 permanent residents apply for citizenship.¹⁹⁶ Instead of using these funds exclusively to the benefit of lawful permanent residents, the surplus could be used in part to make a fee scale a viable alternative.

C. *Eliminating the Fee*

A final alternative would be to raise the fees of certain other forms and applications to cover the costs of adjudicating Form N-600 applications. This alternative is perhaps the easiest to implement, but also raises incredibly difficult policy issues.

¹⁹² *Instructions for Request for Reduced Fee*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/sites/default/files/document/forms/i-942instr.pdf> (last visited Apr. 30, 2020).

¹⁹³ See, e.g., Illinois Coalition for Immigrant and Refugee Rights, Comment Letter on Proposed Rule to Revise U.S. Citizenship and Immigration Services Fee Schedule (June 28, 2016) [hereinafter Illinois Coalition Comment], <https://www.regulations.gov/document?D=USCIS-2016-0001-0245>; Susan B. Dussault, *Who Needs DACA or the Dream Act? How the Ordinary Use of Executive Discretion Can Help (Some) Childhood Arrivals Become Citizens*, 22 LEWIS & CLARK L. REV. 443, 498 (2018) (proposing alternative fee structures to promote more equal access for DACA applicants).

¹⁹⁴ See *Citizenship and Assimilation Grant Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 26, 2019), <https://www.uscis.gov/citizenship/civic-assimilation/learn-about-the-citizenship-and-assimilation-grant-program> (detailing a USCIS grant program which benefits lawful permanent residents (LPRs) seeking naturalization); Dussault, *supra* note 193, at 496 (explaining that the grants are funded through surplus fee revenues, and advocating for the surplus to be used to help Deferred Action for Childhood Arrivals (DACA) recipients legalize their status). For fiscal year 2020, USCIS's budget is \$4.8 billion, of which \$4.7 billion would be generated through mandatory fees. See *A Review of the FY 2020 Budget Request for U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 1 (2019) (statement of Tracy Renaud, Acting Deputy Director, U.S. Citizenship and Immigration Services), <https://docs.house.gov/meetings/HM/HM11/20190509/109434/HHRG-116-HM11-Wstate-RenaudT-20190509.pdf>.

¹⁹⁵ See *Citizenship and Assimilation Grant Program*, *supra* note 194.

¹⁹⁶ *Id.*

Eliminating the fee altogether is likely the easiest alternative to implement because USCIS already adjudicates certain applications at no cost to the applicants. A prime example of this is the I-589, Application for Asylum and for Withholding of Removal. There is no filing fee to apply for asylum in the United States.¹⁹⁷ USCIS covers the costs of adjudicating these applications for the policy reasons at play.¹⁹⁸ Refugees and asylum seekers are fleeing dangerous conditions in their home countries, including political persecution, gang violence, and the atrocities of war. These people likely do not have the resources or capital to pay an application fee, and their access to safety should not turn on their ability to pay. For these reasons, USCIS adjudicates their applications at no cost to the applicant. The N-400, Application for Naturalization through Military Service, is another example of a free USCIS-adjudicated application.¹⁹⁹ Similar to the I-589, there are countervailing policy considerations for USCIS to cover the cost of adjudication of the N-400. Individuals eligible for naturalization through military service have risked their lives for the American polity and should not have to pay a fee to be recognized as full members of our society.

While certainly different than the plight of refugees, asylum seekers, and military personnel, there are also comparable policy considerations at play with the Form N-600 fee. Without proof of status, U.S. citizens cannot exercise many, if not all, of the liberties that flow from citizenship. This affects nearly every facet of their lives, from employment, to health care, to voting, to education, to financial security, and, notably, to freedom from detention and deportation. These policy considerations in waiving fees for the Certificate of Citizenship are arguably just as important as those associated with asylum, refugee, and military naturalization costs.

This alternative, however, would necessarily result in fee increases to other USCIS-adjudicated forms. As discussed *supra*, in 2010, when USCIS removed asylum, refugee, and military naturalization costs from its fee structure, it assumed that Congress would apportion the agency more money to recover those costs.²⁰⁰ When Congress did not apportion sufficient funds, USCIS instead raised fees

¹⁹⁷ *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 14, 2020), <https://www.uscis.gov/i-589>. This might change in light of the Trump administration's proposed rule to charge asylum seekers \$50. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,337 (Nov. 14, 2019).

¹⁹⁸ See *supra* text accompanying notes 51–53.

¹⁹⁹ *Naturalization Through Military Service*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 6, 2020), <https://www.uscis.gov/military/naturalization-through-military-service>.

²⁰⁰ See *supra* text accompanying notes 51–53.

for the majority of its services.²⁰¹ If the agency were to completely eliminate the Form N-600 fee, this might result in further increases to other applications. Coupled with other potential fee increases that the Trump administration has proposed,²⁰² immigrants might need to “[s]cale a [p]aywall” in order to gain legal access to the United States and citizenship.²⁰³

This Note does not advocate for further increases to immigration filing fees. Rather, it highlights this option to demonstrate that there are indeed alternatives to the Form N-600 fee and that these alternatives are not clear-cut. To be sure, a feasible alternative that does not affect other immigrants’ access to USCIS applications requires flexible solutions. In practice, a solution that would survive *Mathews v. Eldridge* balancing would likely involve some combination of these proposed alternatives, such as expanding premium processing while at the same time lowering or completely eliminating the Form N-600 fee. This could be accompanied by other mechanisms that reduce the cost of the fee, such as a fee scale or family cap that allows low-income families to apply for Certificates of Citizenship for multiple children or family members who derive or acquire citizenship.²⁰⁴ While implementing such changes, USCIS would have to ensure that the costs of applications that commonly help low-income immigrants maintain and document lawful status and citizenship, such as the I-130, I-129F, I-485, I-751, I-90, N-565, and the I-131,²⁰⁵ remain affordable.

CONCLUSION

Many U.S. citizens born abroad are facing an impossible situation: either pay a \$1170 fee for a Certificate of Citizenship or risk being unable to access the privileges of citizenship. Given the insufficient protections provided by passports, Certificates of Citizenship are the only documentation that will provide these Americans with protection and confirmation of their rightful status as citizens.

This Note served three purposes in response to this issue. First, it brought attention to the plight of U.S. citizens born abroad. Access to documentation that proves status is extremely important, yet no

²⁰¹ See *supra* text accompanying notes 51–53.

²⁰² See Lind, *supra* note 89.

²⁰³ See Madrid, *supra* note 80.

²⁰⁴ See Illinois Coalition Comment, *supra* note 193.

²⁰⁵ *Id.* These forms are the I-130, Petition for Alien Relative; I-129F, Petition for Alien Fiancé; I-485, Application to Register Permanent Residence or Adjust Status; I-751, Petition to Remove Conditions on Residence; I-90, Application to Replace Permanent Resident Card; N-565, Application for Replacement Naturalization/Citizenship Document; and I-131, Application for Travel Document.

scholars have analyzed this problem within the context of U.S. citizens born abroad and the Certificate of Citizenship. This Note meant to fill that gap. Second, it provided a litigation strategy for practitioners to challenge this fee. The Form N-600 fee infringes on U.S. citizens' rights to procedural due process, but other strategies are available. Third, it provided methods for reducing or eliminating the \$1170 Form N-600 fee. Each method brings its own advantages and disadvantages. However, these disadvantages must give way to the grave constitutional concerns at play. U.S. citizens must have access to documentation that proves their status. Inability to pay the Form N-600 fee should not prevent U.S. citizens from accessing the protections and rights of citizenship. Our Constitution demands better.